TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 169.

JOHN W CLARK, PLAINTIFF IN ERROR,

vs.

LOUIS GERSTLEY AND WILLIAM GERSTLEY, SURVIVING PARTNERS OF THE FIRM TRADING AS ROSSKAM, GERSTLEY & COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 19, 1905.

(20,020.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1906

1 In the Court of Appeals of the District of Columbia.

No. 1569.

JOHN W. CLARK, Appellant,
vs.
LOUIS GERSTLEY ET AL., &c.

Supreme Court of the District of Columbia.

No. 47367. At Law.

LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company, Plaintiffs,
vs.
JOHN F. MONAGHAN, J. CHARLES MCGUIRE, JOHN W. CLARK, and WILLIAM MCGUIRE, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Declaration.

Filed December 10, 1904.

In the Supreme Court of the District of Columbia.

Law. No. 47367.

ISAAC ROSSKAM, LOUIS GERSTLEY, WILLIAM GERSTLEY, Trading as Rosskam, Gerstley & Company, Plaintiffs,
vs.
JOHN F. MONAGHAN, J. CHARLES MCGUIRE, JOHN W. CLARK, WILLIAM MCGUIRE, Defendants.

The plaintiffs, Isaac Rosskam, Louis Gerstley, William Gerstley, trading as Rosskam, Gerstley & Company, sue the defendants, John F. Monaghan, J. Charles McGuire, John W. Clark and Wil-
2 liam McGuire, for that the defendants heretofore, to wit, on the 11th day of September, 1903, by their certain writing obligatory sealed with their seals, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the plaintiffs in the sum of $5,000.00 to be paid to the plaintiffs, which said writing obligatory was and is subject to the condition therein written in the words

following: that if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley and Company for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void, otherwise it shall remain in full force and virtue. And the plaintiffs say that thereafter, to wit, on the days set forth in the particulars of demand hereunto annexed, and which are referred to and made a part of this declaration, the defendants, John F. Monaghan and J. Charles McGuire, purchased from the plaintiffs merchandise aggregating the sum of $14,497.16 as shown in said particulars of demand. And the said John F. Monaghan and J. Charles McGuire have paid on account thereof at various times as shown in said particulars of demand, the sum of $9,100.48, leaving a balance overdue and unpaid amounting to $5,396.68. And the plaintiffs say that the said John F. Monaghan and J. Charles McGuire have not paid or caused to be paid to the plaintiffs for merchandise purchased by them from the plaintiffs as aforesaid the moneys due or to become due thereon when and as the same became due and payable and no part of said balance of $5,396.68 has been paid by the defendants or either of them or by any other person, to the damage of the plaintiffs of $5,000.00, wherefore the plaintiffs bring this suit and claim the sum of $5,000.00 with interest, besides costs.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiffs.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiffs.

Bond.

Know all men by these presents that we, John F. Monaghan and J. Charles McGuire, of the city of Washington, District of Columbia, as principals, and John W. Clark, of the county of Alexan-
3 dria, State of Virginia, and William McGuire, of the City of Washington, District of Columbia, as sureties, are held and firmly bound unto Isaac Rosskam, Louis Gerstley and William Gerstley, trading as Rosskam, Gerstley and Company in the sum of five thousand (5,000) dollars, lawful money of the United States to be paid to the said Rosskam, Gerstley and Company for which payment well and truly to be made we and each of us do bind ourselves and each of our heirs, executors and administrators, jointly and severally, and firmly by these presents.

Sealed with our seals and dated this 11th day of September, 1903.

Whereas the above bounden John F. Monaghan and J. Charles McGuire are desirous of purchasing merchandise from Rosskam, Gerstley and Company, now and from time to time hereafter, which the said John F. Monaghan and J. Charles McGuire have bound and hereby bind themselves to pay for in four months after the date of each respective purchase.

Now, therefore, the condition of the foregoing obligation is such, that if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley and Company, for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void; otherwise it shall remain in full force and virtue.

JOHN F. MONAGHAN. [SEAL.]
J. CHAS. McGUIRE. [SEAL.]
JOHN W. CLARK. [SEAL.]
WM. McGUIRE. [SEAL.]

Signed and sealed in the presence of—

LOUIS SMITH.
W. T. WHELAN.

Statement.

Messrs. Monaghan & McGuire, Washington, D. C., to Rosskam, Gerstley & Co., Dr.

1903.			
Sept.	24.	To mdse	$6365.45
Oct.	5.	"	168.79
	7.	"	167.12
	12.	"	15 30
	16.	"	698.19
	19.	"	37.65
	21.	"	190.58
	30.	"	30.26
Nov.	6.	"	14.98
	9.	"	17.25
	11.	"	506.33
4	18.	"	256.44
	19.	"	78.28
	25.	"	879.61
	27.	"	37.47
Dec.	2.	To mdse	30.92
	10.	"	1122.93
	14.	"	124.60
	17.	"	770.74
	22.	"	191.37
	23.	"	26.95
	30.	"	613.88

1904.					
Jan'y	18.	"	.....	890.25	
	21.	"	.....	160.70	
March	2.	"	.....	233.65	
	16.	"	.....	294.75	
April	22.	"	.....	318.24	
May	3.	"	.....	77.14	
	19.	"	.....	.50	
July	11.	"	.....	59.92	
	27.	"	.....	96.92	
					$14497.16

Cr.

1903.					
Oct.	27.	By mdse	.....	62.33	
Dec.	9.	cash	.....	500.00	
	14.	"	.....	500.00	
	30.	"	.....	500.00	
	31.	mdse	.....	70.73	
1904.					
Jan'y	7.	cash	.....	500.00	
	18.	"	.....	500.00	
	21.	"	.....	500.00	
Feb'y	5.	"	.....	500.00	
	24.	"	.....	500.00	
	29.	"	.....	500.00	
March	16.	"	.....	2000.00	
April	26.	mdse	.....	917 32	
May	3.	"	.....	78.14	
	12.	commission	.....	212.65	
August	2.	mdse	.....	26.65	
October	4.	commission	.....	339.46	
	18.	mdse	.....	685.28	
	26.	commission	.....	170.95	
Nov.	11.	"	.....	36.97	
					9100.48
					$5396.68

5 Supreme Court of the District of Columbia.

FRIDAY, *January* 27, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

At Law. No. 47367.

ISAAC ROSSKAM, LOUIS GERSTLEY, WILLIAM GERSTLEY, Trading as Rosskam, Gerstley & Company, Plaintiffs,

v.

JOHN F. MONAGHAN, J. CHARLES MCGUIRE, JOHN W. CLARK, and WILLIAM MCGUIRE. Defendants.

Now comes here Mr. Eugene A. Jones, attorney, and suggests the death of the plaintiff Isaac Rosskam, which is not denied.

Now come here the plaintiffs by their attorneys, and pray judgment of their demand against the defendant John F. Monaghan, who files herein his plea admitting his indebted- to the plaintiffs in the sum of five thousand dollars ($5,000), and consents that judgment may be rendered therefor: Therefore it is considered that the plaintiffs recover against said John F. Monaghan the sum of five thousand dollars ($5,000), with interest thereon from this date, being the money payable by him to the plaintiffs, by reason of the premises, together with their costs of suit to be taxed by the clerk, and have execution thereof.

Thereupon comes on for hearing the demurrer of the plaintiffs to the pleas of the defendants J. Charles McGuire and William McGuire, and the same having been heard, it is considered that said demurrer be, and hereby is, sustained; with leave to said defendants to file amended pleas within ten days. To which ruling said defendants McGuire note an exception.

Pleas of Defendant John W. Clark.

Filed March 24, 1905.

In the Supreme Court of the District of Columbia.

No. 47367. At Law.

ISAAC ROSSKAM ET AL., Trading as Rosskam, Gerstley & Company, Plaintiffs,

vs.

JOHN F. MONAGHAN ET AL., Defendants.

1. The defendant John W. Clark, for a plea to the declaration of the plaintiffs, says that the plaintiffs at the commencement of this suit were and still are indebted to this defendant in the sum
6 of five thousand dollars, for that heretofore, to wit, on the 11th day of September, 1903, this defendant entered into a

certain agreement with the plaintiffs whereby this defendant agreed to set his hand and seal as surety unto the writing obligatory mentioned in said declaration and in consideration thereof the plaintiffs agreed to sell certain merchandise to the defendants John F. Monaghan and J. Charles McGuire who are hereinafter designated as Monaghan and McGuire, at and for certain prices in said agreement specified and also to allow to said Monaghan and McGuire a continuous credit in the sum of ten thousand dollars ($10,000) for such merchandise to be sold to them by the plaintiffs. And thereupon this defendant in full performance of said agreement on his part did set his hand and seal to said writing obligatory but thereafter the plaintiffs wrongfully refused upon request to sell to said Monaghan and McGuire such merchandise at the prices aforesaid or to allow to them a continuous credit in the sum of ten thousand dollars as aforesaid, whereby the said Monaghan and McGuire were prevented from paying for the merchandise mentioned in the said declaration and this defendant has incurred great liability and has been injured and damaged in the sum of five thousand dollars, for which sum this defendant claims judgment against the plaintiffs and is willing that the same may be set off against the demand of the plaintiffs.

2. And the defendant John W. Clark for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says, that before the making of the said supposed writing obligatory, to wit, on the 11th day of September, 1903, the plaintiffs entered into an agreement with the defendants John F. Monaghan and J. Charles McGuire hereinafter designated as Monaghan and McGuire, whereby, in consideration of the making of said writing obligatory whereby this defendant became bound as a surety as therein set forth, the plaintiffs agreed to sell to the said Monaghan and McGuire the merchandise referred to in said declaration at certain prices and upon certain terms specified in said agreement; but this defendant avers that thereafter, to wit, on the 11th day of December, 1903, the plaintiffs without the consent or knowledge of this defendant, entered into another agreement with said Monaghan and McGuire, and thereafter, to wit, on the 23rd day of March, 1904, without the knowledge or consent of this defendant, the plaintiffs entered into another agreement with the said Monaghan and McGuire, by each of which said other agreements the terms and prices aforesaid were changed, to the prejudice of this defendant, and on and ever after the 11th day of December, 1903, the plaintiffs wrongfully refused to sell to said Monaghan and McGuire merchandise mentioned in the agreement first above mentioned at the prices or upon the terms therein specified, although thereunto duly requested by said Monaghan and McGuire whereby this defendant
7 was wholly discharged of and from all liability under or by reason of said supposed writing obligatory.

3. And the defendant, John W. Clark, for a further plea to said declarations, says that all and every part of the merchandise purchased from the plaintiffs as alleged in said declaration was so purchased under and according to the terms of certain agreements not

under seal entered into from time to time before and since the 11th day of September, 1903, by and between the plaintiffs and the defendants John F. Monaghan and J. Charles McGuire and not under or according to the terms of the agreements which induced this defendant to execute the supposed writing obligatory mentioned in said declaration; wherefore this defendant prays judgment if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory.

4. And this defendant John W. Clark for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says that prior to the sealing of said writing obligatory the plaintiffs entered into an agreement with the defendants John F. Monaghan and J. Charles McGuire, who are hereinafter designated as Monaghan and McGuire, to sell the said Monaghan and McGuire the merchandise referred to in said writing obligatory at and for certain prices specified in letter dated August 25, 1903, and sent by the plaintiffs to said Monaghan and the plaintiffs then represented and caused to be represented to this defendant that the said agreement was applicable to all merchandise to be purchased under said writing obligatory, which said letter was so sent and said representations were so made and caused to be made by the plaintiffs with the intent on their part thereby to induce this defendant to set his seal to said writing obligatory and this defendant believing said representations to be true and relying thereon did thereupon set his seal to said writing obligatory and thereafter the said Monaghan and McGuire purchased from the plaintiffs merchandise amounting to $14,477.16 and no more, of which the sum of $10,617.55 was for merchandise so purchased at the prices aforesaid and the remainder, $3,859.61 was for merchandise purchased by said Monaghan and McGuire at other prices greatly exceeding the prices first mentioned above; which said last above mentioned purchases were made in pursuance of a certain other agreement which was entered into by and between the plaintiffs and said Monaghan and McGuire on or about the 11th day of December, 1903, but without the consent or knowledge of this defendant. And this defendant further says that the said Monaghan and McGuire have paid to the plaintiffs on account of the said sum of $10,617.55 the sum of $9,100.48 leaving due to the plaintiffs under said writing obligatory the sum of $1,517.07 and no more.

5. And this defendant John W. Clark for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says he set his seal to said writing obligatory and permitted
8 the same to be delivered to the plaintiffs upon certain conditions then known to and accepted by the plaintiffs, that is to say, that the plaintiffs would sell and would agree to sell to the defendants John F. Monaghan and J. Charles McGuire, who are hereinafter designated as Monaghan and McGuire, the merchandise referred to in said writing obligatory at and for certain prices then and before that time, to wit, on August 25, 1903, specified by the

plaintiffs and also that the indebtedness of the said Monaghan and McGuire for merchandise to be purchased by them under said writing obligatory would not at any time exceed the sum of $10,000. But this defendant says that the plaintiffs wholly failed to perform said conditions or any of them and in violation thereof refused to sell or agree to sell said merchandise to said Monaghan and McGuire at and for the prices aforesaid and also permitted the indebtedness of said Monaghan and McGuire referred to in said declaration to be and continue from December 10, 1903, to January 21, 1904, greatly in excess of $10,000 whereby this defendant was wholly discharged of and from all liability under or by reason of said supposed writing obligatory.

6. And this defendant John W. Clark for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says that on or about the date thereof, to wit, September 11, 1903, the defendants John F. Monaghan and J. Charles McGuire entered into a copartnership agreement between themselves to engage in the liquor business under the firm name of Monaghan and McGuire and to deal in the goods of the plaintiffs and during the year 1903 the said Monaghan and McGuire established said business and dealt in said goods with great profit to themselves and to the plaintiffs; that said writing obligatory was delivered to the plaintiffs for the purpose of establishing and maintaining the credit of said Monaghan and McGuire with the plaintiffs and of maintaining said business; but on or about the 12th day of January, 1904, the plaintiffs, well knowing the premises and with the intent to secure to themselves the customers and business which had been before that time obtained and established by said Monaghan and McGuire at great cost and expense and to sell directly to such customers and thus increase their profits the plaintiffs wrongfully enticed and induced the said Monaghan to withdraw from said copartnership and to enter the employ of the plaintiffs and as agent of the plaintiffs to sell their goods to said customers; and thereupon the said Monaghan yielding to said enticement and inducement, did withdraw from said copartnership and did enter the employ of the plaintiffs as and for the purpose aforesaid, and thereby the business of said copartnership was wholly destroyed and said Monaghan and McGuire by reason thereof became and were unable to pay the plaintiffs for the merchandise referred to in said writing obligatory; all which the enticement and inducement by the plaintiffs and their employment of said Monaghan as aforesaid were without the consent or
9 knowledge of this defendant, who was wholly discharged of and from all liability under or by reason of said supposed writing obligatory.

7. And for a further plea this defendant says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory because he says: that by the terms of the said writing obligatory the said John F. Monaghan and J. Charles McGuire agreed to and with the plaintiffs and this defendant that they the said John F. Monaghan and J. Charles McGuire would

pay to the plaintiffs for the goods and merchandise purchased from the said plaintiffs in four months after the date of each respective purchase, yet, notwithstanding said agreement the said John F. Monaghan and J. Charles McGuire did not pay for the said goods in the said time agreed upon, nor did the plaintiffs require them to pay for the same but on the contrary extended the time of payment for a valuable consideration, in which the said Monaghan and McGuire had to pay for the said goods and merchandise; that the said plaintiffs never notified this defendant of the failure of the said Monaghan and McGuire to pay for the said goods and merchandise as the same became due and payable under the terms of the said writing obligatory, neither did the plaintiffs notify this defendant that they extended the time of payment of said goods and merchandise beyond the said term of four months as agreed upon in said writing obligatory; that by reason of the failure of the plaintiffs to notify this defendant that the said Monaghan and McGuire did not pay for the said goods and merchandise in four months from the date of each purchase, and by reason of the extension of credit given to the said Monaghan and McGuire without the knowledge or consent of this defendant all of which facts became known to this defendant after the filing of this suit, this defendant was wholly relieved and discharged from all liability under and by virtue of said supposed writing obligatory.

SAMUEL G. BRENT,
MICHAEL J. KEANE,
Attorneys for John W. Clark.

Demurrer to Pleas.

Filed March 29, 1905.

In the Supreme Court of the District of Columbia.

Law. No. 47367.

ROSSKAM, GERSTLEY & COMPANY
vs.
MONAGHAN & McGUIRE.

Now come the plaintiffs by their attorneys Wolf and Cohen and Eugene A. Jones, and demur to each and every of the pleas of the defendant John W. Clark filed herein, and say that each and every of said pleas is bad in substance.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiffs.

Memorandum.

Among the matters of law to be argued at the hearing of the above demurrer are the following:

1. That parol evidence is inadmissible to vary the terms of a bond plain and unambiguous on its face.

2. That no substantial damages are alleged in the pleas of set off.

3. That a surety cannot set off damages due the principal in an action against both.

4. That indulgence by creditor of principal for no definite time does not release surety.

Messrs. Samuel G. Brent, Michael J. Keane, attorneys for defendant Clark:

Please take notice that we will call the above demurrer to the attention of Justice Barnard on Friday, March 31, 1905, at 10 o'clock a. m., or as soon thereafter as counsel may be heard.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiff-.

Supreme Court of the District of Columbia.

FRIDAY, *April* 7, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

At Law. No. 47367.

LOUIS GERSTLEY, WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company, Pl't'ffs,
vs.
JOHN F. MONAGHAN, J. CHARLES MCGUIRE, JOHN W. CLARK, WILLIAM MCGUIRE, Def'ts.

Upon hearing the demurrer to the pleas of the defendant John W. Clark, it is considered that said demurrer be, and hereby is sustained; whereupon said defendant says he will stand upon his pleas; and upon motion of the plaintiffs judgment for their demand is ordered: Therefore it is considered that the plaintiffs recover
11 against said John W. Clark the sum of five thousand dollars ($5,000), with interest thereon from this date being the money payable by said defendant to the plaintiffs, by reason of the premises, together with their costs of suit to be taxed by the clerk, and have execution thereof.

The defendant John W. Clark notes an appeal to the Court of Appeals, and the bond to operate as a supersedeas is fixed in the penalty of $7500.00.

Memorandum.

May 1, 1905.—Notice of surety on appeal bond and appeal bond filed—consent of plaintiffs' attorney.

Order for Transcript of Record.

Filed June 5, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47367.

LOUIS GERSTLEY ET AL.
vs.
JOHN F. MONAGHAN ET AL.

The clerk of the court will please prepare and certify the transcript of the record on the appeal of the defendant John W. Clark, including the following:

(1.) Copy of declaration, notice to plead, copy of bond, and statement attached thereto, omitting affidavit.

(2.) January 27th, 1905, death of plaintiff, Isaac Rosskam, suggested. Judgment by confession against defendant, Monaghan, for $5,000.00, with interest and costs.

(3.) March 24th, 1905, pleas of defendant, John W. Clark, omitting affidavit.

(4.) March 29th, 1905, demurrer to pleas of defendant, John W. Clark, with memorandum thereto attached.

(5.) Copy of Judgment entered on demurrer April 7th, 1905.

(6.) Notice of surety on appeal bond filed, May 1st, 1905. Bond filed and approved same date. Plaintiffs' attorney consenting to surety.

(7.) Copy of this order.

MICHAEL J. KEANE,
Attorney for John W. Clark.

Received copy of this order this 5th day of June, 1905.

MYER COHEN,
Attorney for Plaintiff.

12 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 18, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47,367, at law, wherein Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company, are plaintiffs, and John F. Monaghan *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the

seal of said court, at the city of Washington, in said District, this 13th day of June, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1569. John W. Clark, appellant, *vs.* Louis Gerstley *et al.*, &c. Court of Appeals, District of Columbia. Filed Jun- 17, 1905. Henry W. Hodges, clerk.

13 FRIDAY, *October 13th, A. D.* 1905.

No. 1569.

JOHN W. CLARK, Appellant,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

The above entitled cause was submitted to the consideration of the Court on the printed record and appellant's brief filed herein with leave to the appellees to file brief within five days.

14 No. 1569.

JOHN W. CLARK, Appellant,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

The appellant, John W. Clark, was joined as one of the sureties of Monaghan and McGuire, in the general action upon the surety bond, as has been recited in the statement of the appealed case of McGuire *v.* Gerstley *et al.*, No. 1550. His special pleas were not disposed of at the same time with those of his codefendants, but were postponed to April 7, 1905. On that date plaintiff's demurrers were sustained to each of his seven pleas, and judgment for $5,000 entered against him.

His appeal has been prosecuted separately, and was submitted immediately after the other.

The first six pleas are identical with those of his cosurety, William McGuire, and the demurrers thereto were properly sustained for the reasons that have been given in the opinion delivered in No. 1550. (*Supra*, p. —.)

The only questions for further consideration arise on the demurrer to the seventh plea, which was also sustained.

This plea reads as follows:

"7. And for a further plea this defendant says that he ought not

to be charged with the said debt by virtue of the said supposed writing obligatory because he says: that by the terms of the said writing obligatory the said John F. Monaghan and J. Charles McGuire agreed to and with the plaintiffs and this defendant that they the said John F. Monaghan and J. Charles McGuire would pay to the plaintiffs, for the goods and merchandise purchased from the said plaintiffs in four months after the date of each respective purchase, yet, nothwithstanding said agreement, the said John F. Monaghan, and J. Charles McGuire did not pay for the said goods in the said time agreed upon, nor did the plaintiffs require them to pay for the same, but on the contrary extended the time of payment for a valuable consideration, in which the said Monaghan and McGuire had to pay for the said goods and merchandise; that the said plaintiffs never notified this defendant of the failure of the said Monaghan and McGuire to pay for the said goods and merchandise as the same became due and payable under the terms of the said writing obligatory, neither did the plaintiffs notify this defendant that they extended the time of payment of said goods and merchandise beyond the said term of four months, as agreed upon in said writing obligatory; that by reason of the failure of the plaintiffs to notify this defendant that the said Monaghan and McGuire did not pay for the said goods and merchandise in four months from the date of each purchase, and by reason of the extension of credit given to the said Monaghan and McGuire without the knowledge or consent of this defendant, all of which facts became known to this defendant after the filing of this suit, this defendant was wholly relieved and discharged from all liability under and by virtue of said supposed writing obligatory."

1. So much of this plea as claims a discharge of the liability of the sureties for the want of notice by the plaintiffs of the failure of Monaghan and McGuire to make prompt payments upon the expiration of the credit, provided for each separate sale, is undoubtedly bad. The contract evidenced by the bond contains no requirement that such notice shall be given; and its omission, together with a mere delay in enforcing the obligation of the principals, worked no discharge of the sureties. Sprigg *v.* Bank, 12 Wheat, 201, 207; Lake *v.* Thomas, 84 Md. 608, 623.

2. The plea also undertakes to set up the defense of discharge by reason of an agreement with the principals extending the time of payment.

Undoubtedly, the contract of a surety is a strict one, and he has the right to stand upon the very terms of his undertaking. Any material change in the contract for which one has become surety, whether prejudicial to him or not, or the entry into a binding contract with his principal for the extension of the time of payment, without the surety's knowledge and consent, will work the discharge of his liability. Rees *v.* U. S., 9 Wall. 13, 21; Cross *v.* Allen, 141 U. S. 528, 537; Coughran *v.* Bigelow, 164 U. S. 301, 310; Walker *v.* Washington Title Ins. Co., 19 App. D. C. 575, 588.

The extension of credit must not only be upon a valuable consideration, but for a fixed and definite period. 1 Brandt, Surety-

ship & Guar., sec. 378; Hayes *v.* Wills, 34 Md. 512, 515; Jenkins *v.* Clarkson, 7 Ohio, 72, 75; Thompson *v.* Robinson, 34 Ark. 44, 52; Woolfolk *v.* Plant, 46 Ga. 422, 426; Morgan *v.* Thompson, 60 Iowa, 280, 283.

15 The nature of the unauthorized agreement for an extension of the time of payment must be alleged in the defensive pleas with sufficient certainty to show that it comes within the rule above stated. It has been held that the simple averment that an extension has been made upon a valuable consideration, as in the foregoing plea, is but a statement of a legal conclusion, and is insufficient without the facts showing how the consideration arose. Winne *v.* Colorado Springs Co., 3 Colo. 155, 158; Palmer *v.* White, 65 N. J. L. 69, 70.

However this may be as a general rule applicable to all cases, it is well settled that the plea must at least show that the extension of payment has been agreed upon, in a way binding upon the principal, for a fixed and certain period. Menefee *v.* Clark, 35 Ind. 304, 306; Chrisman *v.* Perrine, 67 Ind. 586, 587; McCormick Harvesting Co., 9 N. D. 482, 484; Glickhouf *v.* Hirschhorn, 73 Ill. 574, 575; Prather *v.* Young, 67 Md. 480, 482.

Tested by these principles the plea is defective. All that is averred is, that without the defendant's knowledge and consent the plaintiffs "extended the time of payment for a valuable consideration."

For these reasons the court did not err in sustaining the demurrer to this plea also, and the judgment will be affirmed with costs.

Affirmed.

16 WEDNESDAY, *November 8th, A. D.* 1905.

No. 1569. October Term, 1905.

JOHN W. CLARK, Appellant,

vs.

LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

November 8, 1905.

WEDNESDAY, *November 22nd, A. D.* 1905.

No. 1569.

JOHN W. CLARK, Appellant,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

On motion of Mr. L. A. Bailey, of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond to act as supersedeas is fixed at the sum of seventy-five hundred dollars.

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between John W. Clark, Appellant, and Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company, appellees, a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of December, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

____ ____.

18 (*Bond on Writ of Error.*)

Know all men by these presents, that we, John W. Clark, as principal, and John Dugan, Patrick T. Moran, John H. Heenan, as sureties are held and firmly bound unto Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company, in the full and just sum of Seventy five hundred dollars ($7,500.) to be paid to the said Louis Gerstley and William Gerstley, surviving partners as aforesaid, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-third day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, lately, at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said John W. Clark, Appellant, and the said Louis Gerstley and William Gerstley, surviving partners aforesaid, Appellees a judgment was rendered against the said John W. Clark and the said John W. Clark having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Louis Gerstley and William Gerstley surviving partners as aforesaid citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said John W. Clark shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN W. CLARK. [SEAL.]
JOHN DUGAN. [SEAL.]
PATRICK T. MORAN. [SEAL.]
JOHN A. HEENAN. [SEAL.]

Sealed and delivered in the presence of—

LORENZO A. BAILEY.
WM. F. COLUMBUS.
WM. F. COLUMBUS.
WM. F. COLUMBUS.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1569 John W. Clark Appellant *vs.* Louis Gerstley *et al.* Supersedeas Bond of John W. Clark on Writ of Error to Supreme Court U. S. Court of Appeals District of Columbia Filed Dec. 6, 1905 Henry W. Hodges Clerk.

19 UNITED STATES OF AMERICA, *ss:*

To Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein John W. Clark is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of December, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 7, 1905. Henry W. Hodges, Clerk.

Service of the within citation is hereby acknowledged on behalf of the defendants in error, December 7, 1905.

MYER COHEN,
Of Att'ys for Def'ts in Error.

20 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 19, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John W. Clark, Appellant, *vs.* Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company No. 1569, October Term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 9th day of December A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,020. District of Columbia Court of Appeals. Term No. 169. John W. Clark, plaintiff in error, *vs.* Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company. Filed December 19th, 1905. File No. 20,020.